

SENATE BILL No. 96

DIGEST OF INTRODUCED BILL

Citations Affected: IC 35-34-1-2.6; IC 35-35; IC 35-37-2.5; IC 35-38-1; IC 35-50.

Synopsis: Bifurcated sentencing. Allows a court to impose a sentence greater than the presumptive sentence only if: (1) the state proves the existence of an aggravating circumstance beyond a reasonable doubt; or (2) the defendant has one or more prior unrelated convictions. Makes conforming amendments. (The introduced version of this bill was prepared by the sentencing policy study committee.)

Effective: July 1, 2005.

Long, Howard

January 4, 2005, read first time and referred to Committee on Corrections, Criminal, and Civil Matters.

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First Regular Session 114th General Assembly (2005)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2004 Regular Session of the General Assembly.

SENATE BILL No. 96

A BILL FOR AN ACT to amend the Indiana Code concerning criminal law and procedure.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 35-34-1-2.6 IS ADDED TO THE INDIANA CODE
2 AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY
3 1, 2005]: **Sec. 2.6. (a) The state may seek to have a person charged**
4 **with a felony sentenced to a penalty greater than the presumptive**
5 **sentence by alleging, on a page separate from the rest of the**
6 **charging instrument, the existence of one (1) or more aggravating**
7 **circumstances listed in IC 35-37-2.5-2.**

8 **(b) The state must file the document described in subsection (a)**
9 **not later than:**

10 **(1) five (5) days after the initial hearing, if the trial is**
11 **scheduled to take place in thirty (30) days or less; or**

12 **(2) thirty (30) days before the trial is scheduled to take place.**

13 **(c) Upon a showing of good cause, the court may:**

14 **(1) grant a continuance for filing; or**

15 **(2) permit the state to amend;**

16 **the document described in subsection (a).**

17 SECTION 2. IC 35-35-1-2 IS AMENDED TO READ AS



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FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 2. (a) The court shall not accept a plea of guilty or guilty but mentally ill at the time of the crime without first determining that the defendant:

- (1) understands the nature of the charge; ~~against him;~~
- (2) has been informed that by ~~his~~ **the** plea ~~he~~ **the defendant** waives ~~his~~ **the defendant's** rights to:

- (A) a public and speedy trial by jury;
- (B) confront and cross-examine ~~the adverse~~ witnesses; ~~against him;~~
- (C) have compulsory process for obtaining witnesses; ~~in his favor;~~ and
- (D) require the state to prove ~~his~~ guilt beyond a reasonable doubt at a trial at which the defendant may not be compelled to testify against ~~himself;~~ **the defendant;**

- (3) has been informed of the maximum possible sentence and minimum sentence for the crime charged and any possible increased sentence by reason of the fact of a prior conviction or convictions, and any possibility of the imposition of consecutive sentences;

- (4) has been informed that by pleading guilty, the defendant waives the right to have a jury determine the aggravating circumstances;**

- ~~(4)~~ **(5)** has been informed that the ~~person~~ **defendant** will lose the right to possess a firearm if the ~~person~~ **defendant** is convicted of a crime of domestic violence (IC 35-41-1-6.3); and

- ~~(5)~~ **(6)** has been informed that if:

- (A) there is a plea agreement as defined by IC 35-35-3-1; and
- (B) the court accepts the plea;

the court is bound by the terms of the plea agreement.

(b) A defendant in a misdemeanor case may waive the rights under subsection (a) by signing a written waiver.

(c) Any variance from the requirements of this section that does not violate a constitutional right of the defendant is not a basis for setting aside a plea of guilty.

SECTION 3. IC 35-35-3-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 1. As used in this chapter:

"Plea agreement" means an agreement between a prosecuting attorney and a defendant concerning the disposition of a felony or misdemeanor charge.

"Presumptive sentence" means the penalty prescribed by IC 35-50-2 without consideration of mitigating **circumstances**, ~~or~~ aggravating

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circumstances, **or a prior conviction.**

"Prosecuting attorney" includes a deputy prosecuting attorney.

"Recommendation" means a proposal that is part of a plea agreement made to a court that:

(1) a felony charge be dismissed; or

(2) a defendant, if ~~he~~ **the defendant** pleads guilty to a felony charge, receive less than the presumptive sentence.

"Victim" means a person who has suffered harm as a result of a crime.

SECTION 4. IC 35-37-2.5 IS ADDED TO THE INDIANA CODE AS A NEW CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]:

Chapter 2.5. Determination of Aggravating Circumstances

Sec. 1. This chapter applies whenever:

(1) a person has been convicted of a felony; and

(2) the state has sought to have the person sentenced to a penalty greater than the presumptive sentence under IC 35-34-1-2.6.

Sec. 2. As used in this section, "aggravating circumstance" means the following:

(1) The harm, injury, loss, or damage suffered by the victim of the offense was:

(A) significant; and

(B) greater than the elements necessary to prove the commission of the offense.

(2) The person has a history of criminal or delinquent behavior.

(3) The victim of the offense was less than twelve (12) years of age or at least sixty-five (65) years of age.

(4) The person:

(A) committed a crime of violence (IC 35-50-1-2); and

(B) knowingly committed the offense in the presence or within hearing of an individual who:

(i) was less than eighteen (18) years of age at the time the person committed the offense; and

(ii) is not the victim of the offense.

(5) The person violated a protective order issued against the person under IC 34-26-5 (or IC 31-1-11.5, IC 34-26-2, or IC 34-4-5.1 before their repeal), a workplace violence restraining order issued against the person under IC 34-26-6, or a no contact order issued against the person.

(6) The person has recently violated the conditions of any

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probation, parole, or pardon granted to the person.

(7) The victim of the offense was mentally or physically infirm.

(8) The person was in a position having care, custody, or control of the victim of the offense.

(9) The injury to or death of the victim of the offense was the result of shaken baby syndrome (as defined in IC 16-41-40-2).

(10) The person threatened to harm the victim of the offense or a witness if the victim or witness told anyone about the offense.

(11) The person:

(A) committed trafficking with an inmate under IC 35-44-3-9; and

(B) is an employee of the penal facility.

Sec. 3. (a) If the person was convicted of the felony in a jury trial, the jury shall reconvene to hear evidence of the aggravating circumstances. If the person was convicted of the felony by trial to the court without a jury, the court alone shall hear evidence of the aggravating circumstances.

(b) If the person has waived the right to have a jury determine the aggravating circumstances, the court alone shall hear evidence of the aggravating circumstances.

Sec. 4. (a) A person is subject to a sentence greater than the presumptive sentence if the jury (in a case tried by a jury) or the court (in a case tried by the court or where the person has waived the right to have a jury determine the aggravating circumstances) finds that the state has proved beyond a reasonable doubt the existence of at least one (1) aggravating circumstance.

(b) A person is subject to a sentence greater than the presumptive sentence if the court finds at a sentencing hearing conducted under IC 35-38-1-3 that the person has a prior unrelated conviction.

SECTION 5. IC 35-38-1-3 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 3. Before sentencing a person for a felony, the court must conduct a hearing to consider the facts and circumstances relevant to sentencing. The person is entitled to subpoena and call witnesses and to present information in ~~his~~ **the person's** own behalf. The court shall make a record of the hearing, including:

(1) a transcript of the hearing;

(2) a copy of the presentence report; and

(3) ~~if the court finds aggravating circumstances or mitigating~~

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circumstances, a statement of the court's reasons for selecting the sentence that it imposes, if:

(A) the court finds mitigating circumstances;

(B) the person is subject to a sentence greater than the presumptive sentence under IC 35-37-2.5-4(a); or

(C) the court finds that the person has a prior unrelated conviction.

SECTION 6. IC 35-38-1-7.1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 7.1. (a) In determining what sentence to impose for a crime, the court shall consider any:

(1) aggravating circumstances found by the jury (in a case tried by a jury) or by the court (in a case tried by the court or where the person has waived the right to have a jury determine the aggravating circumstances) in accordance with IC 35-37-2.5; and

(2) prior unrelated convictions found by the court.

(1) the risk that the person will commit another crime;

(2) the nature and circumstances of the crime committed;

(3) the person's:

(A) prior criminal record;

(B) character; and

(C) condition;

(4) whether the victim of the crime was less than twelve (12) years of age or at least sixty-five (65) years of age;

(5) whether the person committed the offense in the presence or within hearing of a person who is less than eighteen (18) years of age who was not the victim of the offense;

(6) whether the person violated a protective order issued against the person under IC 34-26-5 (or IC 31-1-11.5, IC 34-26-2, or IC 34-4-5.1 before their repeal); a workplace violence restraining order issued against the person under IC 34-26-6; or a no contact order issued against the person; and

(7) any oral or written statement made by a victim of the crime.

(b) The court may consider the following factors as aggravating circumstances or as favoring imposing consecutive terms of imprisonment:

(1) The person has recently violated the conditions of any probation, parole, or pardon granted to the person.

(2) The person has a history of criminal or delinquent activity.

(3) The person is in need of correctional or rehabilitative treatment that can best be provided by commitment of the person to a penal facility.

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(4) Imposition of a reduced sentence or suspension of the sentence and imposition of probation would depreciate the seriousness of the crime.

(5) The victim of the crime was less than twelve (12) years of age or at least sixty-five (65) years of age.

(6) The victim of the crime was mentally or physically infirm.

(7) The person committed a forcible felony while wearing a garment designed to resist the penetration of a bullet.

(8) The person committed a sex crime listed in subsection (e) and:

(A) the crime created an epidemiologically demonstrated risk of transmission of the human immunodeficiency virus (HHV) and involved the sex organ of one (1) person and the mouth, anus, or sex organ of another person;

(B) the person had knowledge that the person was a carrier of HHV; and

(C) the person had received risk counseling as described in subsection (g).

(9) The person committed an offense related to controlled substances listed in subsection (f) if:

(A) the offense involved:

(i) the delivery by any person to another person; or

(ii) the use by any person on another person;

of a contaminated sharp (as defined in IC 16-41-16-2) or other paraphernalia that creates an epidemiologically demonstrated risk of transmission of HHV by involving percutaneous contact;

(B) the person had knowledge that the person was a carrier of the human immunodeficiency virus (HHV); and

(C) the person had received risk counseling as described in subsection (g).

(10) The person committed the offense in an area of a consolidated or second class city that is designated as a public safety improvement area by the Indiana criminal justice institute under IC 36-8-19.5.

(11) The injury to or death of the victim of the crime was the result of shaken baby syndrome (as defined in IC 16-41-40-2).

(12) Before the commission of the crime, the person administered to the victim of the crime, without the victim's knowledge, a sedating drug or a drug that had a hypnotic effect on the victim; or the person had knowledge that such a drug had been administered to the victim without the victim's knowledge.

(13) The person:

(A) committed trafficking with an inmate under IC 35-44-3-9;

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and

(B) is an employee of the penal facility:

(14) The person committed the offense in the presence or within hearing of a person who is less than eighteen (18) years of age who was not the victim of the offense:

(c) (b) The court may consider the following factors as mitigating circumstances or as favoring suspending the sentence and imposing probation:

(1) The crime neither caused nor threatened serious harm to persons or property, or the person did not contemplate that it would do so.

(2) The crime was the result of circumstances unlikely to recur.

(3) The victim of the crime induced or facilitated the offense.

(4) There are substantial grounds tending to excuse or justify the crime, though failing to establish a defense.

(5) The person acted under strong provocation.

(6) The person has no history of delinquency or criminal activity, or the person has led a law-abiding life for a substantial period before commission of the crime.

(7) The person is likely to respond affirmatively to probation or short term imprisonment.

(8) The character and attitudes of the person indicate that the person is unlikely to commit another crime.

(9) The person has made or will make restitution to the victim of the crime for the injury, damage, or loss sustained.

(10) Imprisonment of the person will result in undue hardship to the person or the dependents of the person.

(11) The person was convicted of a crime involving the use of force against a person who had repeatedly inflicted physical or sexual abuse upon the convicted person and evidence shows that the convicted person suffered from the effects of battery as a result of the past course of conduct of the individual who is the victim of the crime for which the person was convicted.

(d) (c) The criteria listed in ~~subsections~~ **subsection** (b) and (c) do not limit the ~~matters~~ **mitigating circumstances** that the court may consider in determining the sentence.

(e) For the purposes of this article, the following crimes are considered sex crimes:

(1) Rape (IC 35-42-4-1):

(2) Criminal deviate conduct (IC 35-42-4-2):

(3) Child molesting (IC 35-42-4-3):

(4) Child seduction (IC 35-42-4-7):

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(5) Prostitution (IC 35-45-4-2);

(6) Patronizing a prostitute (IC 35-45-4-3);

(7) Incest (IC 35-46-1-3);

(8) Sexual misconduct with a minor under IC 35-42-4-9(a);

(f) For the purposes of this article, the following crimes are considered offenses related to controlled substances:

(1) Dealing in or manufacturing cocaine, a narcotic drug, or methamphetamine (IC 35-48-4-1);

(2) Dealing in a schedule I, II, or III controlled substance (IC 35-48-4-2);

(3) Dealing in a schedule IV controlled substance (IC 35-48-4-3);

(4) Dealing in a schedule V controlled substance (IC 35-48-4-4);

(5) Possession of cocaine, a narcotic drug, or methamphetamine (IC 35-48-4-6);

(6) Possession of a controlled substance (IC 35-48-4-7);

(7) Dealing in paraphernalia (IC 35-48-4-8.5);

(8) Possession of paraphernalia (IC 35-48-4-8.3);

(9) Offenses relating to registration (IC 35-48-4-14);

(g) For the purposes of this section, a person received risk counseling if the person had been:

(1) notified in person or in writing that tests have confirmed the presence of antibodies to the human immunodeficiency virus (HIV) in the person's blood; and

(2) warned of the behavior that can transmit HIV.

SECTION 7. IC 35-50-1-1 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 1. The court shall fix the penalty of and sentence a person convicted of an offense. **However, if the offense is a felony, a court may not impose a sentence greater than the presumptive sentence unless the person is subject to a sentence:**

(1) greater than the presumptive sentence under IC 35-37-2.5-4(a) based on the existence of an aggravating circumstance;

(2) greater than the presumptive sentence based on the existence of a prior unrelated conviction found by the court; or

(3) otherwise subject to enhancement.

SECTION 8. IC 35-50-1-2 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 2. (a) As used in this section, "crime of violence" means:

(1) murder (IC 35-42-1-1);

(2) attempted murder (IC 35-41-5-1);

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- (3) voluntary manslaughter (IC 35-42-1-3);
- (4) involuntary manslaughter (IC 35-42-1-4);
- (5) reckless homicide (IC 35-42-1-5);
- (6) aggravated battery (IC 35-42-2-1.5);
- (7) kidnapping (IC 35-42-3-2);
- (8) rape (IC 35-42-4-1);
- (9) criminal deviate conduct (IC 35-42-4-2);
- (10) child molesting (IC 35-42-4-3);
- (11) sexual misconduct with a minor as a Class A felony under IC 35-42-4-9(a)(2) or a Class B felony under IC 35-42-4-9(b)(2);
- (12) robbery as a Class A felony or a Class B felony (IC 35-42-5-1);
- (13) burglary as a Class A felony or a Class B felony (IC 35-43-2-1); or
- (14) causing death when operating a motor vehicle (IC 9-30-5-5).

(b) As used in this section, "episode of criminal conduct" means offenses or a connected series of offenses that are closely related in time, place, and circumstance.

(c) Except as provided in subsection (d) or (e), the court shall determine whether terms of imprisonment shall be served concurrently or consecutively. The court may consider the:

- (1) aggravating **and circumstances in IC 35-37-2.5-2;**
- (2) mitigating circumstances in IC 35-38-1-7.1(b) and IC 35-38-1-7.1(c); **and**
- (3) **existence of a prior conviction;**

in making a determination under this subsection. The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. However, except for crimes of violence, the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under IC 35-50-2-8 and IC 35-50-2-10, to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the presumptive sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

(d) If, after being arrested for one (1) crime, a person commits another crime:

- (1) before the date the person is discharged from probation, parole, or a term of imprisonment imposed for the first crime; or
- (2) while the person is released:
 - (A) upon the person's own recognizance; or
 - (B) on bond;

the terms of imprisonment for the crimes shall be served consecutively,

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1 regardless of the order in which the crimes are tried and sentences are
2 imposed.

3 (e) If a court determines under IC 35-50-2-11 that a person used a
4 firearm in the commission of the offense for which the person was
5 convicted, the term of imprisonment for the underlying offense and the
6 additional term of imprisonment imposed under IC 35-50-2-11 must be
7 served consecutively.

8 SECTION 9. IC 35-50-2-3 IS AMENDED TO READ AS
9 FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 3. (a) A person who
10 commits murder shall be imprisoned for a fixed term of fifty-five (55)
11 years, with not more than ten (10) years added for aggravating
12 circumstances or **a prior conviction, and** not more than ten (10) years
13 subtracted for mitigating circumstances. In addition, the person may be
14 fined not more than ten thousand dollars (\$10,000).

15 (b) Notwithstanding subsection (a), a person who was:

16 (1) at least eighteen (18) years of age at the time the murder was
17 committed may be sentenced to:

18 (A) death; or

19 (B) life imprisonment without parole; and

20 (2) at least sixteen (16) years of age but less than eighteen (18)
21 years of age at the time the murder was committed may be
22 sentenced to life imprisonment without parole;

23 under section 9 of this chapter unless a court determines under
24 IC 35-36-9 that the person is a mentally retarded individual.

25 SECTION 10. IC 35-50-2-4 IS AMENDED TO READ AS
26 FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 4. A person who
27 commits a Class A felony shall be imprisoned for a fixed term of thirty
28 (30) years, with not more than twenty (20) years added for aggravating
29 circumstances or **a prior conviction, and** not more than ten (10) years
30 subtracted for mitigating circumstances. In addition, ~~he~~ **the person**
31 may be fined not more than ten thousand dollars (\$10,000).

32 SECTION 11. IC 35-50-2-5 IS AMENDED TO READ AS
33 FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 5. A person who
34 commits a Class B felony shall be imprisoned for a fixed term of ten
35 (10) years, with not more than ten (10) years added for aggravating
36 circumstances or **a prior conviction, and** not more than four (4) years
37 subtracted for mitigating circumstances. In addition, ~~he~~ **the person**
38 may be fined not more than ten thousand dollars (\$10,000).

39 SECTION 12. IC 35-50-2-6 IS AMENDED TO READ AS
40 FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 6. (a) A person who
41 commits a Class C felony shall be imprisoned for a fixed term of four
42 (4) years, with not more than four (4) years added for aggravating

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circumstances or **a prior conviction, and** not more than two (2) years subtracted for mitigating circumstances. In addition, ~~he~~ **the person** may be fined not more than ten thousand dollars (\$10,000).

(b) Notwithstanding subsection (a), if a person has committed nonsupport of a child as a Class C felony under IC 35-46-1-5, upon motion of the prosecuting attorney, the court may enter judgment of conviction of a Class D felony under IC 35-46-1-5 and sentence the person accordingly. The court shall enter in the record detailed reasons for the court's action when the court enters a judgment of conviction of a Class D felony under this subsection.

SECTION 13. IC 35-50-2-7 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 7. (a) A person who commits a Class D felony shall be imprisoned for a fixed term of one and one-half (1 1/2) years, with not more than one and one-half (1 1/2) years added for aggravating circumstances or **a prior conviction, and** not more than one (1) year subtracted for mitigating circumstances. In addition, ~~he~~ **the person** may be fined not more than ten thousand dollars (\$10,000).

(b) Notwithstanding subsection (a), if a person has committed a Class D felony, the court may enter judgment of conviction of a Class A misdemeanor and sentence accordingly. However, the court shall enter a judgment of conviction of a Class D felony if:

(1) the court finds that:

(A) the person has committed a prior, unrelated felony for which judgment was entered as a conviction of a Class A misdemeanor; and

(B) the prior felony was committed less than three (3) years before the second felony was committed;

(2) the offense is domestic battery as a Class D felony under IC 35-42-2-1.3; or

(3) the offense is possession of child pornography (IC 35-42-4-4(c)).

The court shall enter in the record, in detail, the reason for its action whenever it exercises the power to enter judgment of conviction of a Class A misdemeanor granted in this subsection.

SECTION 14. IC 35-50-2-10 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 10. (a) As used in this section:

(1) "Drug" means a drug or a controlled substance (as defined in IC 35-48-1).

(2) "Substance offense" means a Class A misdemeanor or a felony in which the possession, use, abuse, delivery, transportation, or

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1 manufacture of alcohol or drugs is a material element of the
 2 crime. The term includes an offense under IC 9-30-5 and an
 3 offense under IC 9-11-2 (before its repeal). ~~July 1, 1991).~~

4 (b) The state may seek to have a person sentenced as a habitual
 5 substance offender for any substance offense by alleging, on a page
 6 separate from the rest of the charging instrument, that the person has
 7 accumulated two (2) prior unrelated substance offense convictions.

8 (c) After a person has been convicted and sentenced for a substance
 9 offense committed after sentencing for a prior unrelated substance
 10 offense conviction, the person has accumulated two (2) prior unrelated
 11 substance offense convictions. However, a conviction does not count
 12 for purposes of this subsection if:

13 (1) it has been set aside; or

14 (2) it is a conviction for which the person has been pardoned.

15 (d) If the person was convicted of the substance offense in a jury
 16 trial, the jury shall reconvene for the sentencing hearing. If the trial was
 17 to the court, or the judgment was entered on a guilty plea, the court
 18 alone shall conduct the sentencing hearing, under IC 35-38-1-3.

19 (e) A person is a habitual substance offender if the jury (if the
 20 hearing is by jury) or the court (if the hearing is to the court alone)
 21 finds that the state has proved beyond a reasonable doubt that the
 22 person had accumulated two (2) prior unrelated substance offense
 23 convictions.

24 (f) The court shall sentence a person found to be a habitual
 25 substance offender to an additional fixed term of at least three (3) years
 26 but not more than eight (8) years imprisonment, to be added to the term
 27 of imprisonment imposed under IC 35-50-2 or IC 35-50-3. If the court
 28 finds that:

29 (1) three (3) years or more have elapsed since the date the person
 30 was discharged from probation, imprisonment, or parole
 31 (whichever is later) for the last prior unrelated substance offense
 32 conviction and the date the person committed the substance
 33 offense for which the person is being sentenced as a habitual
 34 substance offender; or

35 (2) all of the substance offenses for which the person has been
 36 convicted are substance offenses under IC 16-42-19 or
 37 IC 35-48-4, the person has not been convicted of a substance
 38 offense listed in section 2(b)(4) of this chapter, and the total
 39 number of convictions that the person has for:

40 (A) dealing in or selling a legend drug under IC 16-42-19-27;

41 (B) dealing in cocaine or a narcotic drug (IC 35-48-4-1);

42 (C) dealing in a schedule I, II, or III controlled substance

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- 1 (IC 35-48-4-2);
 2 (D) dealing in a schedule IV controlled substance
 3 (IC 35-48-4-3); and
 4 (E) dealing in a schedule V controlled substance
 5 (IC 35-48-4-4);
 6 does not exceed one (1);

7 then the court may reduce the additional fixed term. However, the court
 8 may not reduce the additional fixed term to less than one (1) year.

9 (g) If a reduction of the additional year fixed term is authorized
 10 under subsection (f), the court may also consider the aggravating ~~or~~
 11 **circumstances in IC 35-37-2.5-2, the** mitigating circumstances in
 12 IC 35-38-1-7.1, **and the existence of a prior unrelated conviction to:**

- 13 (1) decide the issue of granting a reduction; or
 14 (2) determine the number of years, if any, to be subtracted under
 15 subsection (f).

16 SECTION 15. IC 35-50-2-11 IS AMENDED TO READ AS
 17 FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 11. (a) As used in this
 18 section, "firearm" has the meaning set forth in IC 35-47-1-5.

19 (b) As used in this section, "offense" means:

- 20 (1) a felony under IC 35-42 that resulted in death or serious
 21 bodily injury;
 22 (2) kidnapping; or
 23 (3) criminal confinement as a Class B felony.

24 (c) The state may seek, on a page separate from the rest of a
 25 charging instrument, to have a person who allegedly committed an
 26 offense sentenced to an additional fixed term of imprisonment if the
 27 state can show beyond a reasonable doubt that the person knowingly or
 28 intentionally used a firearm in the commission of the offense.

29 ~~(d) If after a sentencing hearing a court finds that a person who~~
 30 ~~committed an offense used a firearm in the commission of the offense,~~
 31 ~~the court may sentence the person to an additional fixed term of~~
 32 ~~imprisonment of five (5) years.~~

33 **(d) If the person was convicted of the offense in a jury trial, the**
 34 **jury shall reconvene to hear evidence in the enhancement hearing.**
 35 **If the trial was to the court, or the judgment was entered on a**
 36 **guilty plea, the court alone shall hear evidence in the enhancement**
 37 **hearing.**

38 **(e) If the jury (if the hearing is by jury) or the court (if the**
 39 **hearing is to the court alone) finds that the state has proved beyond**
 40 **a reasonable doubt that the person knowingly or intentionally used**
 41 **a firearm in the commission of the offense, the court may sentence**
 42 **the person to an additional fixed term of imprisonment of five (5)**

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years.

SECTION 16. IC 35-50-2-13 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 13. (a) The state may seek, on a page separate from the rest of a charging instrument, to have a person who allegedly committed an offense of dealing in a controlled substance under IC 35-48-4-1 through IC 35-48-4-4 sentenced to an additional fixed term of imprisonment if the state can show beyond a reasonable doubt that the person knowingly or intentionally:

(1) used a firearm; or

(2) possessed a:

(A) handgun in violation of IC 35-47-2-1;

(B) sawed-off shotgun in violation of IC 35-47-5-4.1; or

(C) machine gun in violation of IC 35-47-5-8;

while committing the offense.

(b) If after a sentencing hearing a court finds that a person committed an offense as described in subsection (a), the court may sentence the person to an additional fixed term of imprisonment of not more than five (5) years, except as follows:

(1) If the firearm is a sawed-off shotgun, the court may sentence the person to an additional fixed term of imprisonment of not more than ten (10) years.

(2) If the firearm is a machine gun or is equipped with a firearm silencer or firearm muffler, the court may sentence the person to an additional fixed term of imprisonment of not more than twenty (20) years. The additional sentence under this subdivision is in addition to any additional sentence imposed under section 11 of this chapter for use of a firearm in the commission of an offense.

(b) If the person was convicted of the offense in a jury trial, the jury shall reconvene to hear evidence in the enhancement hearing. If the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall hear evidence in the enhancement hearing.

(c) If the jury (if the hearing is by jury) or the court (if the hearing is to the court alone) finds that the state has proved beyond a reasonable doubt that the person knowingly or intentionally committed an offense as described in subsection (a), the court may sentence the person to an additional fixed term of imprisonment of not more than five (5) years, except as follows:

(1) If the firearm is a sawed-off shotgun, the court may sentence the person to an additional fixed term of imprisonment of not more than ten (10) years.

(2) If the firearm is a machine gun or is equipped with a

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1 firearm silencer or firearm muffler, the court may sentence
 2 the person to an additional fixed term of imprisonment of not
 3 more than twenty (20) years. The additional sentence under
 4 this subdivision is in addition to any additional sentence
 5 imposed under section 11 of this chapter for use of a firearm
 6 in the commission of an offense.

7 SECTION 17. IC 35-50-2-14 IS AMENDED TO READ AS
 8 FOLLOWS [EFFECTIVE JULY 1, 2005]: Sec. 14. (a) The state may
 9 seek to have a person sentenced as a repeat sexual offender for a sex
 10 offense under IC 35-42-4-1 through IC 35-42-4-9 or IC 35-46-1-3 by
 11 alleging, on a page separate from the rest of the charging instrument,
 12 that the person has accumulated one (1) prior unrelated felony
 13 conviction for a sex offense under IC 35-42-4-1 through IC 35-42-4-9
 14 or IC 35-46-1-3.

15 (b) After a person has been convicted and sentenced for a felony
 16 committed after sentencing for a prior unrelated felony conviction
 17 under IC 35-42-4-1 through IC 35-42-4-9 or IC 35-46-1-3, the person
 18 has accumulated one (1) prior unrelated felony conviction. However,
 19 a conviction does not count for purposes of this subsection, if:

20 (1) it has been set aside; or

21 (2) it is one for which the person has been pardoned.

22 ~~(c) The court alone shall conduct the sentencing hearing under~~
 23 ~~IC 35-38-1-3.~~

24 **(c) If the person was convicted of the offense in a jury trial, the**
 25 **jury shall reconvene to hear evidence in the enhancement hearing.**
 26 **If the trial was to the court, or the judgment was entered on a**
 27 **guilty plea, the court alone shall hear evidence in the enhancement**
 28 **hearing.**

29 (d) A person is a repeat sexual offender if the jury (if the hearing
 30 is by jury) or the court (if the hearing is to the court alone) finds
 31 that the state has proved beyond a reasonable doubt that the person had
 32 accumulated one (1) prior unrelated felony conviction under
 33 IC 35-42-4-1 through IC 35-42-4-9 or IC 35-46-1-3.

34 (e) The court may sentence a person found to be a repeat sexual
 35 offender to an additional fixed term that is the presumptive sentence for
 36 the underlying offense. However, the additional sentence may not
 37 exceed ten (10) years.

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